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14 *Itself and all its institutions*

9 UNITED STATE DISTRICT COURT

10 DISTRICT OF NEVADA

11 ★ ★ ★ ★ ★

13 JANET SOBEL, et al.,

14 Plaintiffs,

Case No.: 3:06-CV-00545- LRH-RAM

15 vs.

16 THE HERTZ CORPORATION, a
17 Delaware Corporation, et al

18 Defendants.
19 _____/

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21 **STATE OF NEVADA BOARD OF REGENTS OF THE NEVADA SYSTEM OF HIGHER**
22 **EDUCATION ON BEHALF OF ITS EIGHT INSTITUTIONS AND ITS AGENTS AND**
23 **EMPLOYEES ACTING IN THEIR OFFICIAL CAPACITY'S REPLY TO PLAINTIFF'S**
24 **RESPONSE TO OBJECTION**

25 The State of Nevada's Board of Regents of the Nevada System of Higher
26 Education on behalf of its eight institutions and its agents and employees, in their official
27 capacities, acting within the course and scope of their duties, (NSHE) has filed an
28 objection to the jurisdiction pursuant to the 11th Amendment to the United States
Constitution and opted out pursuant to FRCP23(c)(2)(B)(v). The four plaintiffs have

1 agreed that the State of Nevada's Board of Regents of the Nevada System of Higher
 2 Education and its eight institutions should be excluded from the settlement order but not
 3 their agents and employees when acting within the course and scope of their duties
 4 (Document 223). The Plaintiffs provided no legal authority for their position. The
 5 Defendants have not filed any response to NSHE. NSHE files this reply to the Plaintiffs'
 6 response.

7 **MEMORANDUM OF POINTS AND AUTHORITIES**

8 The 11th Amendment to the United States Constitution states,

9 The Judicial power of the United States shall not be
 10 construed to extend to any suit in law or equity, commenced
 11 or prosecuted against one of the United States by Citizens of
 another State, or by Citizens or Subjects of any Foreign
 State.

12 "(A)n unconsenting State is immune from suits brought in federal courts by her
 13 own citizens as well as by citizens of another state." *Pennhurst State Sch. & Hosp. v.*
 14 *Halderman*, 465 U.S. 89, 100, 104 S. Ct. 900; 79 L. Ed. 2d 67; 1984 U.S. LEXIS 4; 52
 15 U.S.L.W. 4155 (1984). "The State of Nevada does not waive its immunity from suit
 16 conferred by Amendment XI of the Constitution of the United States." NRS 41.031(3).
 17 The State of Nevada's Board of Regents of the Nevada System of Higher Education
 18 and its member institutions are entities of the State. *Krainski v. State ex rel. Bd. of*
 19 *Regents*, 616 F.3d 963 (9th Cir. 2010). The immunity includes NSHE agents and
 20 employees. *Id.*, 616 F. 3d at 968. Neither the Plaintiffs or Defendants may use the
 21 judicial power of the United States to involuntarily include in litigation NSHE's agents
 22 and employees acting in their official capacities.

23 In the case of *Walker v. Liggett Group*, 982 F. Supp. 1208 (S. D. M. Va. 1997), a
 24 United States District Court was presented with the identical issue. Class action
 25 plaintiffs were trying to include states and their officers, agencies and institutions in a
 26 class action by mailing notice under FRCP 23(b)(3). Initially, the court entered an order
 27 including states and their officials unless the state and officials had opted out. Some
 28 states appeared and objected and other states did not. After motions and briefing, the

1 court dismissed all states, both appearing and non-appearing, and all of their officers,
2 agencies, and institutions pursuant to 11th Amendment immunity. See *Thomas v. FAG*
3 *Bearings Corp.*, 50 F.3d 502 (8th Cir. 1994) (11th Amendment bars involuntary joinder of
4 a state agency in a federal court action).

5 Plaintiffs argue that NSHE must identify, by name and transaction, every
6 individual state employee and agent to be excluded from the class. *Walker* addressed
7 that issue. The 11th Amendment provides immunity to those individuals. Absent the
8 consent of each individual, each of them is immune. 982 F. Supp. at 1210. The burden
9 is not on NSHE to show a lack of consent but on the Plaintiffs to show consent on the
10 part of each individual.

11 The Plaintiffs make other arguments which lack merit. First, the Plaintiffs argue
12 that only natural persons can rent vehicles. (Document 223, page 1, lines 23-24).
13 NSHE and its institutions, through its employees and agents, may rent vehicles. In turn,
14 the vehicles are driven by NSHE's or its member institutions agents and employees in
15 the course and scope of their duties.

16 Next, the Plaintiffs argue that NSHE has not provided "proof" that NSHE can act
17 on behalf of its agents and employees. NSHE and its member institutions has
18 respondeat superior liability for their agents and employees when acting within the
19 course and scope of their duties. *Evans v. Southwest Gas*, 108 Nev. 1002, 842 P.2d
20 719 (1992). See NRS 41.0349 (state to indemnify employee for acts within course and
21 scope of duty); see NRS 41.0339 (state to provide defense for acts within course and
22 scope of duty); see NRS 41.0338 (official attorney to provide representation for acts
23 within course and scope of duty)

24 Further, the Plaintiffs' attorneys have no authority to represent the agents and
25 employees of NSHE and its member institutions when they act within the course and
26 scope of their duties. NRS 228.110 provides that only the attorney general or other
27 authorized attorneys may represent state agencies and officials. The Plaintiffs counsel
28

1 are not so authorized. *Walker*, 982 F. Supp. at 1210-1211 (Plaintiff s class action
2 counsel not authorized to represent state or state officials).

3 Also, NSHE, which includes its member institutions and agents and employees in
4 their official capacities in the course and scope of their duties, have opted out under
5 FRCP 23(c)(2)(B)(v). The Plaintiffs have made no argument regarding that opting out.
6 *See San Francisco Health Plan v. McKesson Corp.*, 2011 U.S. Dist. LEXIS 22210 (D.
7 Ma. 2011) (states and state agencies excluded from the class under the FRCP 23(b)(3)
8 superiority requirement).

9 The Plaintiffs have included no legal authority for their argument that the NSHE,
10 its member institutions and its agents and employees in their official capacities are not
11 immune from being brought into this action. If the Plaintiffs or Defendants provide
12 further legal arguments, NSHE requests additional time to respond.

13 In conclusion, NSHE has asserted its Eleventh Amendment immunity in this
14 litigation and has opted out on behalf of itself, its institutions, and their agents and
15 employees when those employees and agents were acting within the course and scope
16 of their employment when renting or leasing motor vehicles. The Court has no authority
17 to include NSHE or their agents and employees when acting in their official capacity.
18 The Court should exclude the State of Nevada's Board of Regents of the Nevada
19 System of Higher Education, its member institutions (University of Nevada-Reno,
20 University of Nevada-Las Vegas, Nevada State College, College of Southern Nevada,
21 Desert Research Institute, Truckee Meadows Community College, Western Nevada

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1 College, and Great Basin College) and their agents and employees acting within their
2 official capacities when renting or leasing motor vehicles.

3 Dated this 3rd day of May, 2011.

4
5 /S/ JOHN ALBRECHT

6 JOHN ALBRECHT

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CERTIFICATE OF SERVICE

Pursuant to FRCP 5(b), I certify that I am an employee of the University of Nevada, Reno, of the Nevada System of Higher Education, over the age of eighteen years and not a party to the within action. I further certify that on May 3, 2011, I electronically filed the foregoing **STATE OF NEVADA BOARD OF REGENTS OF THE NEVADA SYSTEM OF HIGHER EDUCATION ON BEHALF OF ITS EIGHT INSTITUTIONS AND ITS AGENTS AND EMPLOYEES ACTING IN THEIR OFFICIAL CAPACITY'S REPLY TO PLAINTIFF'S RESPONSE TO OBJECTION** with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the following:

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15 I further certify that I served the following individuals by placing a a true and correct
16 copy of the **STATE OF NEVADA BOARD OF REGENTS OF THE NEVADA SYSTEM**
17 **OF HIGHER EDUCATION ON BEHALF OF ITS EIGHT INSTITUTIONS AND ITS**
18 **AGENTS AND EMPLOYEES ACTING IN THEIR OFFICIAL CAPACITY'S REPLY**
19 **TO PLAINTIFF'S RESPONSE TO OBJECTION** in the United States Mail, postage
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